SUPREME COURT NO. SC84872

IN THE SUPREME COURT OF MISSOURI

ROBERT LESAGE,

Plaintiff/Appellant

vs.

DIRT CHEAP CIGARETTES AND BEER, INC.

Defendant/Respondent

APPEAL FROM THE CIRCUIT COURT OF
THE CITY OF ST. LOUIS, MISSOURI
TWENTY-SECOND JUDICIAL COURT
DIVISION 1

Honorable Margaret M. Neill
Circuit Judge

SUBSTITUTE REPLY BRIEF OF APPELLANT

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ARGUMENT

The trial court erred in failing to consider MO. REV. STAT. § 1.205 and Conner v. Monkem when interpreting the Uniform Parentage Act contrary to legislative mandate, and this Court should reverse that error.

In Conner v. Monkem, 898 S.W.2d 89 (Mo. *banc* 1995), this Court extended the definition of "person" under the Missouri Wrongful Death Act to include a non-viable fetus. In doing so, the Court read the Missouri Wrongful Death Statute, MO. REV. STAT. § 537.080 in conjunction with MO. REV. STAT. § 1.205, which provides:

> 1. The general assembly of this state finds that:
>
> (1) The life of each human begins at conception;
>
> (2) Unborn children have protectable interests in life, health, and well-being;
>
> (3) The natural parents of unborn children have protectable interests in the life, health, and well-being of their unborn child.
>
> 2. Effective January 1, 1988, the laws of this state shall be interpreted and construed to acknowledge on behalf of the unborn child at every stage of development, all the rights, privileges, and immunities available to other persons,

> citizens, and residents of this state, subject only to the Constitution of the United States, and decisional interpretations thereof by the United States Supreme Court and specific provisions to the contrary in the statutes and constitution of this state.
>
> 3. As used in this section, the term **"unborn children"** or **"unborn child"** shall include all unborn child or children or the offspring of human beings from the moment of conception until birth at every stage of biological development.
>
> 4. Nothing in this section shall be interpreted as creating a cause of action against a woman from indirectly harming her unborn child by failing to properly care for herself or by failing to follow any particular program of prenatal care.

In Conner, the Missouri Supreme Court acknowledged the legislative mandate that all laws of Missouri are to be interpreted and construed *in pari materia* with § 1.205 when it read § 1.205 in conjunction with The Wrongful Death Act. Conner, *supra,* 898 S.W.2d at 92. Such a reading requires an interpretation of the Wrongful Death Statute that includes an unborn child from the moment of conception as a person for whom an action for wrongful death will lie. The Court in Conner felt it particularly compelling that § 1.205.1(3) gives the natural parents of unborn children a protectable interest in the life of the unborn

child from the moment of conception.[1] Id. While § 1.205 accords natural parents protectable interests in the life of a child from conception, under the trial court's ruling here, those rights are realized by an unwed father only **at legitimization** of the child.

Respondent acknowledges that the Uniform Parentage Act has been universally construed as protecting the rights of children **and** parents, with the children's rights being paramount. Paramount does not mean exclusive under Missouri interpretations of the UPA. Respondent forgets this notion when it argues that protecting Robert LeSage under the UPA would serve no function under the statute.

Contrary to Respondent's contention, Robert LeSage is not asking this Court "remove 210.830 from the UPA." This Court should consider the dual purpose of the UPA as well as the mandatory construction and purpose of § 1.205 and protect the interests of Robert LeSage as Dillon LeSage's natural parent. Such an interpretation in not "an enlargement" of the UPA's provisions, but is in accordance with the legislative mandate of § 1.205.

[1] Conner is factually similar to the case at bar, including the death of the nonviable fetus with his mother and the marital status of his parents. Robert LeSage seeks remedy for the loss of his son's life in which he has a protectable interest pursuant to § 1.205.

Respondent states that the UPA contemplates a pre-birth determination of paternity, but argues that a posthumous determination is not within the statute. This is incorrect. The legislature did not intend the UPA to provide the exclusive method for establishing paternity for all areas. *See* In the Matter of Nocita, 914 S.W.2d 358 (Mo. *banc* 1996) (Paternity in probate settings is governed by the probate code rather than the UPA). The omission of a method for a posthumous determination of paternity in the UPA is not fatal to the concept.

Contrary to Respondent's argument, MO. REV. STAT. § 210.826.4 does not detail a method for making a pre-birth paternity determination, either. There is also no provision in the UPA or Missouri Law for obtaining service of process on an unborn fetus. This omission does not nullify pre-birth determinations under the UPA any more than omission nullifies posthumous determinations.

The UPA tolls all pre-birth attempts at determining paternity, save the preservation of evidence, until the child is born. MO. REV. STAT. § 210.830. A full hearing and determination of paternity is not possible until the child is born. Pre-birth filing for determination of paternity mentioned in the UPA does nothing more than preserve evidence to be considered after the birth of the child, and is not an actual paternity determination as Respondent suggests.

The UPA provides that a Next Friend is to be appointed for a minor who seeks a determination of paternity, or that a guardian *Ad Litem* represent a child who is a defendant in a paternity action, but no provision exists to allow an unborn child to be joined as a party. Therefore, the Uniform Parentage Act may

contemplate an action to determine paternity prior to a child's birth, but does not supply a mechanism for completing this process.

Even if Robert LeSage had begun a paternity proceeding prior to the death of Dillon as Respondent suggests is required, the result under the trial court's reasoning would have been the same. The matter would have been stayed after preservation of necessary evidence. Dillon's death would have ended the inquiry, as the trial court would not have appointed an *Ad Litem,* deciding instead that the action to determine paternity did not survive the death of the child. Robert LeSage would then have been unable to continue with the paternity matter, as Dillon would no longer be a party.

This means that, regardless of the method chosen, an unwed father cannot maintain a wrongful death action for an unborn child under **any** circumstances, as he can never establish standing to so do. Under the trial court's interpretation of the UPA which Respondent applauds as correct, an unwed father could never protect the interest in his unborn child's life accorded him by § 1.205, nor could he sue for that child's wrongful death, contrary to Conner.

Respondent relies on Budding v. SSM Healthcare, 19 S.W.3d 678 (Mo. *banc* 2002) for the proposition that the legislature's omission of a posthumous method for determining paternity means that this type of determination is not possible under the UPA. Budding is inapplicable here, as the legislature has not touched upon the subject of posthumous declarations of paternity, and does not forbid them by omission. Robert LeSage is not requesting a change in the UPA,

but rather that it be interpreted to give effect to other provisions of Missouri law, including § 1.205. Because a posthumous action to determine paternity is not foreclosed by the UPA, it should be allowed here, in furtherance of § 1.205 and this Court's notation in Conner.

Unless another provision of law fills the gap for obtaining service and appointing a Next Friend for a fetus, pre-birth determinations of paternity are no more possible than posthumous determinations, as they can not be completed until the child is actually born. Respondent's argument that pre-birth paternity determinations are possible necessarily fails if posthumous determinations are not also possible.

In Conner, there was no declaration of paternity for the unborn child prior to his death. This Court implied the propriety of a posthumous declaration of paternity in Conner without detailing a method to achieve the declaration. One such mechanism is supplied by Missouri Rule of Civil Procedure 52.04. *See* discussion, *infra*.

Another alternative would be for the trial court to appoint either a Next Friend or a Petitioner *Ad Litem* to represent Dillon LeSage's interests in a hearing to determine paternity, as Robert LeSage requested. While the trial court denied the request for a Plaintiff/Petitioner *Ad Litem*, the court made no determination as to the propriety of a Next Friend to represent Dillon LeSage. Either a Next Friend or Petitioner *Ad Litem* would have satisfied the requirement of Dillon's addition as

a party, in lieu of analysis under Rule 52.04. Instead, the trial court addressed the language of the UPA in isolation, without heed to its purpose.

An unborn child has future interests to protect, where a deceased child has none. A Next Friend in a paternity action serves to protect the future interests of the unborn child. Unless their interests are adverse to the rights of the child's, the child's mother or father may represent him as Next Friend. Only if the Next Friend, presumably the child's mother or father, has interests conflicting those of the child is a Guardian *Ad Litem* to be appointed under the UPA.

As Next Friend, the child's mother or father would receive process and act on the child's behalf. There is no reason not to allow Robert LeSage to proceed as his deceased child's Next Friend in the instant cause of action. His interests are not adverse to those of Dillon LeSage as Dillon has no interest to be protected at this point, save not being bastardized. Allowing Robert LeSage to proceed, without Dillon or as his Next Friend, effectuates the UPA's goal of protecting the rights of parents.

Such a result also effectuates the legislature's mandate expressed in § 1.205 and protects the rights of natural fathers. The UPA when read *in pari materia* with § 1.205 does not contradict **any language** of the UPA. Rather, § 1.205 commands that it be harmonized with the UPA. This requires application of the UPA to protect the interests of natural parents in the life of a child, regardless of marital status of the parents or whether the child is even alive, as the Wrongful Death Act allows a cause of action after the death of a child.

By harmonizing the UPA and this Court's interpretations of Missouri's Wrongful Death Statute, § 1.205 neither adds to, nor subtracts from the UPA. Rather, § 1.205, here as in Conner, would cause the Uniform Parentage Act to be interpreted to give effect to Robert LeSage's protectable interest in the life of Dillon LeSage.

Dillon was not a *per se* indispensable party and the lack of analysis under Rule 52.04 constitutes reversible error.

Respondent seeks to engraft a "*per se* indispensability" upon a child for a paternity action, and cites numerous cases from other jurisdictions interpreting their respective versions of the UPA. None of these cases apply here. Not only are these cases interpreting different versions of the UPA[2], each of the cases cited

[2] Although called the "Uniform" Parentage Act, the statute appears in many different forms. Washington's version noted in In Re Burley, 658 P.2d 8 (Wash. App. 1983) (cited as Burley v. Johnson in Respondent's Brief), makes no provision for a Next Friend and provides representation of the child by "his general guardian or a Guardian *Ad Litem.*" It further provides that the child's mother or father may not represent the child by guardian or otherwise. R.C.W. 26.26.090. This difference in the statute accounts for the inability of the father in Gonzales v. Cowen, 884 P.2d 19 (Wash. App. 1994) to represent his deceased child in a posthumous paternity hearing. Although the trial court in the case at bar

by Respondent differs from the case at bar in each case, in that the child was alive and could have been named a party to the paternity action then before the court. No further analysis would be required in Missouri under similar circumstances, as 52.04(a) requires joinder when it is possible to do so and a living child would meet this requirement.

The distinction between "indispensable" and "necessary" parties is to be governed by the facts of a particular case. This is illustrated in the cases cited by Respondent, which call the child in a paternity action both "indispensable," and

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found Gonzales instructive, it failed to account for the differences in the two states' UPAs.

In re the Marriage Burkey, 689 S.W.2d 726 (Colo. App. 1984), held that the child was indispensable to a paternity determination under Colorado's then existing version of the UPA, CO. REV. STAT. 19-9-110. That version has since been replaced by CO. REV. STAT. 19-4-110 (1999) which removed the requirement of the child as a party and states "the child **may** be made a party to the action to determine paternity." (emphasis added) People ex Rel. Orange County v. MAS, 962 P.2d 339 (Colo. App. 1998).

Indiana Code § 31-4-1-1 (1979), Indiana's version of the Uniform Parentage Act, discussed in Kieler v. CAT, 616 N.E.2d 34 (Ind. App. 1993), replaced a prior version of the code and specifically made the child a **necessary party** to a paternity action.

merely "necessary." In Re Burley , 658 P.2d 8 (Wash. App. 1983), In re the Marriage of Burkey, 689 P.2d 726 (Colo. App. 1984) (Child is indispensable), and RAJ v. LBV, 817 P.2d 37 (Az. App. 1991), Kieler v. CAT, 616 N.E.2d 34 (In. App. 1993) (child is necessary party).

In certain cases, the failure to make the child a party to a paternity action is reversible error. Cases set forth by Respondent for this proposition involve situations ***where the child could have been joined***. In those situations, it would also be feasible to join the child under Rule 52.04 (a) and the court would not need to continue the analysis under Rule 52.04(b). Where, as here, the child can not be joined, 52.04(b) controls. Missouri Rule 52.04(b) requires a pragmatic determination as to whether an unavailable party is indispensable or merely necessary in any given case. The trial court's failure to engage in this analysis in the case at bar mandates reversal. Kingsley v. Burack, 536 S.W.2d 7 (Mo. *banc* 1976).

Likewise, Respondent's reliance on the word "shall" in the UPA as an indication of a child's indispensability to a paternity action is misplaced. Defendant attempts to distinguish cases following the constructional canon that "shall," while appearing to be mandatory, may be merely directory under certain circumstances on the basis that these cases "address the performance of an act by a public official in a specified time." (Respondent's Substitute Brief at Page 28). This is a distinction without a difference.

The UPA's direction that a child "shall" be made a party to a paternity action also requires performance of an act (joinder of the child) by a public official (the trial judge). Jenkins v. Croft, 63 S.W.3d 710 (Mo. App. 2002). This is not different from the other cases cited by Appellant, Farmers & Merchants Bank & Trust Co. v. Director of Revenue, 896 S.W.2d 30 (Mo. *banc* 1995), and Rundquist v. Director of Revenue, 62 S.W.3d 643 (Mo. App. 2001).

Respondent argues that the absence of a penalty provision in a statute is "but one method" to be used in determining whether the word "shall" is directory or mandatory, but fails to provide authority for any other "methods." Furthermore, paternity proceedings in other states that have adopted the UPA do not uniformly require the child as a party, defeating the notion that the child's joinder to a paternity action is the **quintessential** requirement of such an action. *See* Note 2, *supra*.

Even if joinder of Dillon LeSage were mandatory, such a requirement can not coexist with the rights of Robert Lesage conferred by § 1.205. This Court noted in Conner that the majority of jurisdictions limit recovery for the death of the unborn to viable fetuses. Conner, *supra* 898 S.W.2d at 92. § 1.205 required Missouri court decisions to diverge from the majority in order to acknowledge the protectable interest of parents in the lives of unborn children *from the moment of conception*. If the UPA prohibits a posthumous determination of paternity, Missouri Law again requires a result different than those states regarding parties to a paternity determination in order to comply with § 1.205.

This Court should not consider Respondent's discussion of Robert LeSage's evidence of paternity.

As noted by Respondent, standing is a legally cognizable interest in the subject matter of a suit. Respondent has no standing to criticize or applaud Robert LeSage's evidence on the issue of Dillon's paternity, as Respondent could never be party to such a determination, either under the UPA or the facts of this case. The trial court never reached Robert LeSage's evidence and, under the trial court's holding, neither DNA testing nor the statement of Brandi Roussin from the grave attested to by God Almighty would have been considered. The trial court's denial of Robert LeSage's Petition for Paternity was not based on the evidence he presented, but on the court's perception of its inability to hear this matter.

Assuming *arguendo* that Plaintiff had opportunity but failed to raise his equal protection challenge to the trial court's application of the UPA, this Court may still review the constitutionality of the trial court's ruling.

Respondent argues that City of Chesterfield v. Director of Revenue, 811 S.W.2d 375 (Mo. *banc* 1991), questions the "viability of the public interest exception to the rule regarding preservation of constitutional claims." (Respondent's Substitute Brief at 58). This is not the holding of City of Chesterfield. Rather, this Court noted that the public interest exception did not apply *under the facts of that case*. This Court's decision in City of Chesterfield is not dispositive when, as here, there is a question as to whether there has been a

waiver at all. Such a determination must be made on the facts of the case and the circumstances and pleadings before the trial court. Callier v. Director of Revenue, 787 S.W.2d 639 (Mo. *banc* 1989).

Whether or not this Court will hear a constitutional challenge that has been waived is only a question, obviously, if there has been a waiver. Because the trial court determined that it lacked jurisdiction to hear this matter due to its perception of Robert LeSage's lack of standing, there was no waiver in his failure to raise a constitutional challenge at the trial court level. State ex rel. York v. Dougherty, 969 S.W.2d 223 (Mo. 1998). Under the circumstances, Robert LeSage did not waive the constitutional challenge to the trial court's actions as he had no earlier opportunity to raise the challenge. Even if this Court holds that a waiver did occur, the Court retains authority to review the matter under the public interest doctrine.

CONCLUSION

For errors described in Appellant's Substitute Brief and Substitute Reply Brief, Appellant Robert LeSage respectfully requests that this Honorable Court reverse the dismissal of this matter and remand this matter to the trial court to allow Robert LeSage to establish his paternity of Dillon LeSage and pursue a wrongful death action for his son's death, and for such other and further relief as this Court deems reasonable and proper.

Pursuant to Missouri Rule of Civil Procedure 84.06 (c), I certify that this brief complies with the limitation contained in Rule 84.06 (b) and contains 3,264 words.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing was hereby sent via U.S. Mail to the following on this 6th day of December, 2002:

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